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No. 82-2061

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROADWAY EXPRESS, INC., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Respondent Roadway Express, Inc.,[1] respectfully requests that this Court deny the National Labor Relations Board's

[1] Respondent Roadway Express, Inc., a Delaware corporation, is a wholly-owned subsidiary of Roadway Services, Inc., as are Roadway Express, Inc. of Nevada, Roadway Express, Inc. of Arizona, Reader Properties, Inc., Carrier Supply, Inc., Roadway Service (Canada, Ltd.) and Roadway Express, Ltd.

Petition for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 17, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (Petition, App. A, 1a-16a) is reported at 700 F.2d 687. The decision and order of the National Labor Relations Board (Petition, App. C, 19a-52a) are reported at 257 N.L.R.B. 1197.

JURISDICTION

The jurisdictional requisites are correctly summarized in the Petition. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Rela-

tions Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides in pertinent part:

> It shall be an unfair labor practice for an employer
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . . .

COUNTERSTATEMENT OF THE CASE

Respondent makes the following additions or clarifications to Petitioner's statement of the factual and procedural background of this case.

1. In early September, 1979, Albert T. Wilson received a warning letter for mishandling freight. (Petition, App.A 2a). On September 5, 1979, Wilson showed the letter to assistant terminal manager Sammy Harmon and asked him to investigate why it had been issued. The following day, Harmon advised Wilson that the warning letter had been removed from his file. (Petition, App.C, 25a).

Two days later, Wilson and a union steward contacted driver superintendent Al Southern and asked about the warning letter and whether it had been removed from the file. When Southern indicated he knew nothing about such a letter, Wilson advised him that he had previously discussed it with Harmon. Because of this Southern instructed Wilson to discuss the matter with Harmon. (Petition, App.C, 25a).

Instead of obeying the instruction that he wait until Harmon came into work that day to confirm that the matter had been resolved, Wilson proceeded to take his inquiries to the terminal manager and the office manager. Being unaware of Southern's instructions to Wilson, they took the time to determine that the letter had been removed as Harmon had told Wilson it was. After Wilson disobeyed his directive, Southern contacted Harmon and asked him about the warning letter. Harmon stated that he had already told Wilson that the letter was erroneously issued and that he had removed it from the file. Southern then contacted Wilson and asked him if Harmon had told him he had taken care of the letter. Wilson said that Harmon had told him this. As a consequence, Southern gave Wilson a warning letter for wasting time, as Wilson had

disregarded his instructions to handle the matter with Harmon and as a result had wasted working time and unnecessarily taken up the time of other management officials. (Petition, App.C, 252-26a).

2. William J. Howard had been an over-the-road driver for Respondent for over three years when he was assigned to drive a truck from Atlanta to Memphis on November 23, 1979. Prior to being assigned the truck, it was inspected in the safety lane by a mechanic and placed on the ready line. Howard also inspected the truck before departing and noticed that the brake shoe on one wheel protruded approximately one quarter of an inch past the edge of the hub. When Howard grabbed the brake shoe, he was able to move it slightly in the hub. Additionally, Howard asserted that air leaked from the

valve inside the cab for a brief period when he set the parking brake. (Petition, App.C, 26a).

Howard reported this to garage operations manager W. E. Hartley, who read the write-up Howard had given him and proceeded to inspect the truck. He found everything in proper working order and advised Howard of his findings. Howard said he wanted a third mechanic's opinion. Hartley advised Howard that if he wanted to have another mechanic check out the truck he was sure that Howard's supervisors would give him a warning letter for delaying freight because the mechanic would find nothing wrong with the truck. Howard asked that a mechanic look at the truck and the mechanic found nothing wrong with it. (Petition, App.C,

26a).

The warning letter that Howard received was issued to him pursuant to a work rule that had been agreed upon by Respondent and the Union to remedy the problem of delayed freight occasioned by groundless requests for multiple truck inspections. Pursuant to this rule, if after the safety lane pretrip inspection by a mechanic, a driver believes there is a problem with his truck, he reports it to the garage supervisor. If the supervisor agrees with the driver, a mechanic is assigned to repair the truck. If the supervisor finds no problem with the truck, it is released and the driver is instructed to commence his trip. If the driver then insists that a union mechanic inspect the truck, that inspection will be made with the understanding that the work rule provides that in the event the mechanic

inspecting the truck finds no problem, the driver is given a warning letter for delaying freight. If the mechanic finds a defect in the unit, the safety lane mechanic who originally certified the truck as ready is given a warning letter. (Petition, App.C, 23a-24a).

In both of these cases the NLRB issued complaints asserting that the issuance of the warning letters violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), on the theory that the employees were disciplined for asserting rights under a labor contract. The Eleventh Circuit ruled that the employees' actions were not concerted under Section 7 of the Act, 29 U.S.C. § 157, and, therefore, the NLRB did not have jurisdiction over the cases.

REASONS FOR DENYING THE PETITION

Two matters were at stake in the underlying unfair labor practice proceedings. The most obvious was the propriety of the warning letters issued to Wilson and Howard. The other matter was the legal propriety of what is referred to as the Interboro doctrine,[2] i.e., is individual activity by an employee that is not directed at, or in preparation for, group action "concerted" activity within the purview of the NLRB's jurisdiction.

When the case reached the Court of Appeals, for all practical purposes the only viable issue was whether the Board's Interboro doctrine was a proper interpretation of the law as the warning notices

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[2] Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enf'd, 388 F.2d 495 (2d Cir. 1967) (an individual employee's attempt to enforce the provisions of a collective bargaining agreement may be deemed to be concerted activity under Section 7 of the Act).

issued were no longer in effect, since more than six months had passed from the date of their issuance. Under Article 45, Section 1 of the collective bargaining agreement (GCX 4), the warning letters expire six months after being issued.

It is apparent that the only reason the Board seeks certiorari in this case is the fact that the Court has granted the Board's petition in NLRB v. City Disposal Systems, Inc., Case No. 82-960. Because of this occurrence, the Board wants to seek a reversal of the ultimate issue before the Eleventh Circuit if this Court rules in its favor in City Disposal.

The question that is presented by all this is what is to be gained by granting the Board's petition for certiorari in this case? The two employees who were issued warning letters have lost any need

to have them revoked as they are no longer in effect. Because of this, the case now involves a simple battle over the legal principle found in the Interboro doctrine. There is no need, however, for this battle to continue between Respondent and Petitioner in this case. It is quite clear to all concerned that the decision of this Court in City Disposal Systems, Inc., supra, concerning the propriety of the Interboro doctrine will be the law in the Eleventh Circuit. Thus, the Court's resolution of City Disposal Systems, Inc. will resolve the dispute over the decision of the Court of Appeals for the Eleventh Circuit in the instant case.

Recognizing the importance of the Court's decision in City Disposal Systems, Inc., Respondent has filed a brief as amicus curiae on behalf of the Respon-

dent in that case. Thus, whatever battle that remains to be fought over the Interboro doctrine can be left to that case. There is no need to continue the litigation of the instant case.

CONCLUSION

The Board's Petition for a Writ of Certiorari should be denied.

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